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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-564

HERMAN I. SHALLER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Petitioner, Herman I. Shaller, respectively prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this proceeding on July 13, 1973.

OPINIONS BELOW

The opinion of the Court of Claims (No. 292-68) has not yet been reported. It is printed as an Appendix to this petition.

JURISDICTION

The judgment of the Court of Claims was entered on July 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Navy, or anyone designated by him, has absolute discretion to make or not make incentive awards for "tangible" benefits as he sees fit without regard to the Navy's own administrative regulations (particularly Navy Civilian Personnel Instructions NCPI 450), promulgated as directed under incentive awards legislation (particularly 5 U.S.C. 2121 et seq.), after all criteria and conditions for such awards under the regulations and the legislation are satisfied by an employee.

2. Whether the Court of Claims committed error when it set aside and disregarded a preponderance of evidence from several different sources and made a decision based upon so called "credible testimony" of a single self-interested witness whose testimony was in conflict with and contrary to the preponderance of evidence, a part of which was that witness's own earlier writings and which refuted his own "credible testimony". In particular, did the Court of Claims commit error when it decided that petitioner was not the first and true inventor of Skycatch and Fishhook, despite a preponderance of evidence to the contrary; the only exception being the oral testimony of a single self-serving witness whose so called "credible testimony" was in conflict with his own earlier writings, particularly, his own written record of his invention which refuted his own "credible testimony".

3. Whether the Court of Claims committed error by making two distinct and independent decisions, in particular, (1) that the Navy had absolute discretion to deny an incentive award to petitioner for "tangible" benefits, the law notwithstanding, and (2) that petitioner was not the first and true inventor of Skycatch and Fishhook, the preponderance of evidence notwithstanding, when either

adverse finding (1) or (2) alone would have been sufficient to dispose of the case.

4. Whether there was "Presidential" consideration for an incentive award under the meaning of 5 U.S.C. 2121 et seq., and 5 U.S.C. 4501 et seq., particularly, whether a letter written to the President requesting review and consideration for an incentive award under the aforesaid statutes, and a reply to that letter by an Assistant Secretary of the Navy stating that "The President has asked me to reply to your letter. . . ." represents and constitutes "Presidential" consideration for an incentive award under the law.

STATUTES AND REGULATIONS INVOLVED

1. 5 U.S.C. Section 2121 et seq. (pertinent portions only) provide as follows:

2121. "The departmental awards program set forth in this chapter *shall* be carried out under such regulations and instructions as may be issued by the United States Civil Service Commission . . ." (emphasis added).

2123. "The head of each department is authorized to pay cash awards. . ."

2. Navy Civilian Personnel Instructions (NCPI) 450, promulgated as directed under regulations and instructions issued by the United States Civil Service Commission under 5 U.S.C. Section 2121, provide in part, as follows:

a. NCPI 450, section 4-14(3) states that "all inventions will receive award consideration".

b. NCPI 450, section 5-5 states that "Cash awards (in $5 increments) for employee contributions resulting in tangible benefits *will* be based upon the award scale. . ." (emphasis added).

3. 5 U.S.C. Section 4501 et seq. provides in pertinent part that

"A Presidential award may be in addition to an agency award under section 4503 of this title. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 443."

(NOTE: Under 5 U.S.C. sections 4501-4506, Presidential awards are not limited to a maximum specified amount. Petitioner's claim is for cash awards for use by the Government of his invention under both 5 U.S.C. 2121 et seq., and 5 U.S.C. 4501 et seq., since the non-damage recoveries of Polaris test missiles occurred during the period when 5 U.S.C. 2121 et seq. was in effect, and the recoveries of Poseidon and Sprint test missiles occurred during the period when 5 U.S.C. 4501 et seq. was in effect.)

4. 5 U.S.C. Section 701 et seq. (pertinent portions only) provide as follows:

702. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392)."

706. ". . . The reviewing court shall–

(1) . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . ."

STATEMENT OF THE CASE

This case is of general public interest and is particularly relevant to the interest and productivity of over two million Federal employees.

In 1957, petitioner first disclosed his ideas and suggestions for non-damage recoveries, after launch, of ballistic test missiles in general, and non-destructive testing of Polaris missile launchings in particular. Specifically, petitioner was first to conceive and disclose the feasibility of building an operational system whereby ballistic test missiles are arrested in mid-air after launching from either land-based, underground, or underwater launching platforms, and thereby achieved, for the first time in missile development and test history, a system for non-destructive tests of the launch phase of missile flight and non-damage recoveries of ballistic missiles after an actual launch.

The basic inventive concept and broad general arrangement of the above system was published by petitioner in Naval Ordinance Experimental Unit (NOEU) Report 0019 dated October 1, 1957. Publication was in Silver Spring, Maryland. *The Navy had no plans to produce a non-damage missile recovery system prior to publication of petitioner's report on the feasibility for such a system.*

The system described in the petitioner's report was beyond the scope of his job assignment within the Navy Department where petitioner was employed at that time. It was also beyond the scope of existing ballistic missile test practice and beyond any capability requested or envisioned as attainable by the Government at that time. For example, petitioner's proposed recovery system was initially judged within the Navy to be less desirable than another recovery system using nets. An underwater net recovery system was initially adopted, in preference to

petitioner's recovery system. The net system was *not* a non-damage recovery system but it did meet the Navy's requirements and specifications for recovery at that time. It was only after the net recovery system proved to be troublesome, unreliable and very costly, because test missiles were damaged or lost, that the Navy reconsidered and finally adopted petitioner's proposal for a non-damage recovery system.

The sequence of events which followed publication of petitioner's report included the forwarding of his report to a Navy facility in Philadelphia with an assigned task to engage in detailed analysis of the petitioner's system. The results of that task confirmed both the feasibility and desirability of building the petitioner's system. Accordingly, construction of petitioner's non-damage recovery system was completed and installed in different locations within the United States. The Navy designated its non-damage recoveries after underwater launchings as "Fishhook". Recoveries from land-based launchings were designated as "Skycatch".

The petitioner's system, initially used by the Navy for Polaris and Poseidon test missiles, was subsequently adopted and used by the Army for Sprint test missiles.

Whereas in prior weapons system developments, thousands of very expensive test missiles, some costing in excess of one million dollars each, were expended in developing and evaluating missile design information, only four Polaris test missiles were purchased because of petitioner's non-damage recovery test system. While unbudgeted billions of tax dollars have been expended in other weapons systems development programs, this was not the case during the Polaris development and design program because of Skycatch and Fishhook, the basic invention for which was provided by the petitioner.

In 1960, upon learning that certain Navy personnel at Philadelphia had filed a patent application for his missile recovery system, petitioner caused his own patent application to be filed. The issues raised by petitioner at that time regarding his invention and the invention of Navy personnel at Philadelphia were resolved within the Navy wherein the patent claims of the Philadelphia personnel were to be restricted to their specific refinement of petitioner's invention. When the Navy filed the applications for patent, however, both applications contained claims of the petitioner's invention. Because of a bureaucratic mixup, the U.S. Patent Office never became aware that it had two patent applications for substantially the same invention, and subsequently granted two patents instead of the customary one, since both applications were for substantially the same invention.

In 1963, the Navy was persuaded by personnel in the Navy's Office of Patent Counsel that petitioner was entitled to an award for his contribution to the Polaris development program because of his ideas and suggestions which produced Skycatch and Fishhook. Awards for contributions to that program, however, had already been considered completed by the Navy and award consideration for the petitioner was therefore denied. When petitioner learned about this, he, in his own behalf, requested the Navy to consider him for an incentive award for his contribution to the Polaris missile program, not as a matter of discretion on the part of the Navy to make or not make awards as it sees fit, but as a matter which required award consideration as a right of the petitioner under the Navy's own administrative regulations. Accordingly, an Incentive Awards Committee was was convened to consider making an incentive award to the petitioner. The members of that committee were openly hostile to the petitioner because of his insistance

on his rights, and, out of the early deliberations of that committee came a questioning of and a spreading of clouds regarding authorship of the petitioner's work and writings related to Skycatch and Fishhook. In this connection, a full investigation was ordered by the Incentive Awards Committee. The Navy's Office of Patent Counsel was requested to make a thorough inquiry into the matter of inventions which produced Skycatch and Fishhook.

The report which was issued as a result of the aforesaid investigation is cited in the Court of Claims' finding of fact #19. The report states in pertinent part that "Mr. Shaller provided the basic inventive concept and broad general arrangement for Skycatch and Fishhook; whereas Mr. Siegel developed a refined and operationally desirable arrangement which embraces the basic concept proposed by Mr. Shaller". (Mr. Siegel was a named co-inventor in one of the two patents which were issued on Skycatch/ Fishook.) As a result of this finding, the Navy tendered an award to petitioner for "intangible local-exceptional" benefits in the amount of $300.00 which the petitioner refused because it was not an appropriate award. Petitioner calimed that an award for "tangible" benefits was due in his case.

The central issue which the petitioner brought before the Court of Claims focused upon his claim for an award for "tangible" benefits which the Navy refused to tender as required under its own administrative regulations issued as required by 5 U.S.C. 2121 et seq., particularly, Navy regulations NCPI 450 sec. 5-5 which states in pertinent part that "Cash awards for employee contributions resulting in tangible benefits will be based upon the award scale. . ." The payment of cash awards when there are tangible benefits is, therefore, not a matter of administrative discretion, but a matter required under the

law. In denying an award for "tangible" benefits, the Navy refused to comply with its own regulations under the law. The Court of Claims, in turn, erroneously concluded that the Secretary of the Navy, in this case, had absolute discretion to make or not make an award as he saw fit.

In his brief to the Court of Claims, petitioner calculated that the "tangible" benefits amounted to over 1.5 billion dollars during the first ten years (1958-1968) of Skycatch and Fishhook operations. This claim, i.e., the amount of savings, was never refuted. In this connection, a description of Skycatch/Fishhook given to the House Science and Astronautics Committee on July 28, 1959 by Admiral Raborn, then director of the Navy's Special Projects Office, included the following:

> "And when the missile was fired, we caught the missile and suspended it in midair here, *thus saving a tremendous amount of money*, because the missile itself would have broken up, and also the instrumentation would have been lost. This is a very, very wonderful thing." (Plaintiff's exhibit No. 11)

REASONS FOR GRANTING THE WRIT

Incentive awards have become a tradition in both the private and governmental sectors of the American economy. Within the Federal Government, these awards are provided by statutes which permit some latitude in the exercise of sound judgment and discretion when intangible benefits from employee suggestions are involved. There are no provisions however for the exercise of *absolute* discretion as claimed by the Navy Department and as endorsed by the Court of Claims. In the case at hand, there is no latitude for discretion to make or not make an award for "tangible" benefits when

an invention is involved, and when there are admitted "tangible" benefits resulting from that invention.

I.

THE INCENTIVE AWARDS ACT IS EFFECTIVELY REPEALED BY THE DECISION OF THE COURT OF CLAIMS AND THE PUBLIC INTEREST IS HARMED.

The ultimate findings of the Court of Claims are not sustained by the evidence and primary facts, and, in effect, the Court proclaims a repeal of the incentive awards act. In particular:

Contrary to the Court of Claims' ultimate finding #34, incentive awards legislation 5 U.S.C. 4501 et seq. and its predecessor statute 5 U.S.C. 2121 et seq. do not provide heads of Government agencies with absolute discretion to make or not make awards as they see fit, nor do they grant discretion to disregard the agency's own administrative regulations which were tailored to implement the incentive awards legislation. On the contrary, heads of Government agencies are directed, under the legislation, to make awards when due in accordance with the law and Civil Service Commission and agency regulations which implement the law.

Contrary to the Court of Claims' ultimate finding #35, petitioner was not accorded proper consideration under the law and pertinent regulations. In particular, he was denied an award due under the law for "tangible" benefits which the Navy admitted existed.

Contrary to the Court of Claims' ultimate finding #36, petitioner has made a clear showing of abuse of discretion by the Navy in its refusal to tender an award for admitted "tangible" benefits resulting from the Skycatch and Fishhook operations for which petitioner provided the basic inventive concept and broad general arrangement.

Petitioner has never denied that design details and actual construction of Skycatch and Fishhook involved the talents and efforts of many people both within and outside of Government in many areas of the United States. Petitioner does claim, however, that the entire effort which produced Skycatch and Fishhook would not have materialized without his basic concept and invention, and his demonstration of the feasibility and workability of that concept and invention.

Contrary to the Court of Claims' ultimate finding #37, petitioner has shown that the award offered for "intangible" benefits under the criterion of "local" benefits was arbitrary, capricious, and contrary to the evidence. In particular, "Local" as defined in Navy regulations NCPI 450 states as follows: "Affects activity-wide operations and/or a substantial number of people or their work *within the activity*; or is in the public interest *only in the locality*". (emphasis added) Within the context of this definition, the application of the criterion of "local" would have meant, in this case, that the application of Skycatch and Fishhook was restricted to the activity and locality in which the petitioner was employed, namely, the Naval Ordinance Experimental Unit, in Silver Spring, Maryland. This is, on its face, false, since there are no Skycatch or Fishhook test sites in Silver Spring, Maryland. On the other hand, Skycatch and Fishhook are applicable and extensively used not only within the Navy Department, but also within the Department of Army. Also, Skycatch and Fishhook installations are located at more than one test site. The facts also show that private companies under government contract as well as several government activities and facilities at different locations were involved in the details of design and construction of petitioner's invention without which Skycatch and Fishhook would not have been produced, and that the

petitioner's basic test system was used for Polaris, Poseidon, and Sprint test missiles, each of which represent major elements of the United States' nuclear force. These facts clearly place the category of application of petitioner's system in the realm of "General" rather than "Local" insofar as these terms are defined by Navy regulation in NCPI 450.

The public has the right to expect that incentive awards legislation will be uniformly and fairly applied as a matter of public policy. In the case at hand however, where taxpayer savings were estimated to be over 1.5 billion dollars for the first ten years of operations, in particular, for the period between 1958 and 1968, and with additional savings accruing each year from continued use of petitioner's ideas and invention, denial of petitioner's rightful claim to an award for "tangible" benefits under the law deserves and requires the consideration and attention of this Court at this time.

A law of Congress which provides for payment by the Government of only one dollar for each thousand dollars saved (i.e., the Navy's award schedule as directed by the Civil Service Commission) is clearly in the public interest. Stimulation of cost-saving was intended by the Congress to be promoted, not ground to nothingless by bureaucratic whim and capriciousness. The trial at the Court of Claims produced only two individuals who had a significant role in producing Skycatch and Fishhook. One was the petitioner and the other was the Navy's Philadelphia witness Siegel. Each was awarded a patent, one to petitioner as an individual, and one to Siegel as a co-inventor with another employee in Philadelphia. Yet, in spite of the fact that enormous savings were publicized and admitted by the Navy, not a single penny was tendered to either man for "tangible" benefits.

No clearer showing of crass disregard for the law, sanctioned by the Court of Claims, could be imagined than that exhibited in the following excerpt from a letter to the petitioner by a certain Admiral Moore. In denying petitioner's claim, the Admiral wrote as follows:

> "The Navy Incentive Awards Board was well aware that *tangible benefits did result* from the use of the non-damage missile recovery system when compared to other methods used in the past. . . *However, the Board determined that these benefits should not be used as a basis for determining an award* for your contribution to the development of the system." (Emphasis added)

The Navy's admitted awareness of "tangible" benefits, and its outright refusal to use such benefits as the standard for making an appropriate award, illustrates the Navy's blatant departure from the intent of Congress as specified by its own regulations.

In its ultimate finding #38, the Court of Claims decided that petitioner was never considered for a "Presidential" award. In this connection, the fact remains that there was a letter written to the President and there was a Presidential reply to that letter, the subject of which was an incentive award for the petitioner. The particulars which show that the court was in error in this finding are as follows:

There can be only one reasonable purpose for writing a letter to the President of the United States on a matter, and that purpose would be to receive "Presidential" consideration regarding that matter.

In this case, the National Society of Professional Engineers wrote a letter to the President bringing to his attention the petitioner's work and accomplishment, and requesting the President's review and consideration of an incentive award for the petitioner. The reply to that

letter by an Assistant Secretary of the Navy (in Court of Claims finding #30) begins: "The President has asked me to reply to your letter of January 31, 1966". There can be no doubt therefore that there was "Presidential" consideration regarding petitioner's incentive award.

II.

THE DEPARTURE OF THE COURT OF CLAIMS FROM ACCEPTED JUDICIAL CUSTOM AND PROCEDURE

1. Having decided that the Navy has absolute discretion to make or not make incentive awards as it sees fit, even where all conditions for such awards have been met, the Court went on to decide further that petitioner was not the inventor of the Skycatch/Fishhook missile recovery system. Since an adverse finding as to either (a) absolute discretion, or, (b) invention authorship, would have been sufficient to dispose of the case, the Court of Claims departed from usual judicial practice when it decided both points.

Adoption of the above obvious departure from normal judicial custom and practice strongly suggests that the Court of Claims did not properly consider the many factual issues essential for its understanding and decision.

2. In its decision to set aside the Navy's 1963 finding (cited in Court of Claims finding #19) that petitioner was the first and true inventor of Skycatch and Fishhook, the Court of Claims disregarded a preponderance of evidence and made a decision which was in conflict with and contrary to that evidence, solely on the basis of so called "credible testimony" of a single witness whose recollection at the trial was in conflict with all other evidence, including his own earlier written record which is a part of the evidence in this case. The preponderance of evidence in this case, focusing attention on the Court of Claims

findings #9, #16, and #19 at this point, clearly illuminates the following facts:

(a) that petitioner's invention disclosure was sent to NAEF in Philadelphia *prior* to any other conceptions and/or disclosures of any kind which have ever been recorded as associated with Skycatch and Fishhook.

(b) that the only other person who the Government has linked with the petitioner to the Skycatch/Fishhook invention was a Mr. M. Siegel, to whom no incentive award was ever offered and whose own record of invention, which is a part of the record in this case, clearly demonstrates that his earliest invention conception came *after* the report containing petitioner's invention was sent to the Navy facility in Philadelphia where Mr. Siegel was employed.

III.

PRIOR DECISIONS ON INCENTIVE AWARDS AND HOW THIS CASE DIFFERS FROM THEM

The Court of Claims cited three decisions in its opinion for the proposition that Department heads, in effect, have absolute discretion to make or not make awards.

In *Martilla v. United States,* 118 Ct. Cl. 177 (1950), the plaintiff (a clerk in the Audit Section of the Agricultural Adjustment Administration), sought an award on the basis of savings to the government because of certain audits made. It appears that such audits were a part of his normal job requirements and as such any awards were expressly forbidden by the then controlling statutes and regulations. While noting that judicial consideration of such (employee) claims were to be avoided, the court expressly reserved any opinion on whether such judicial considerations were barred absolutely for any and all circumstances.

In distinction to Martilla, the plaintiff Shaller's proposal and suggestion was outside of his job requirements, a fact never controverted by the Government.

In *Kempinski v. United States*, 164 Ct. Cl. 451 (1964), cert. denied, 377 U.S. 981, the plaintiff submitted a suggestion which was rejected by the Post Office Department. Having thus disposed of the controversy with this single fact finding, and as an apparent courtesy to bureaucratic practice in the executive branch, the Court of Claims went further and noted that department heads have discretion to make or not make awards. This latter assertion is in direct conflict with the Administrative Procedure Act, 5 U.S.C. 701-706 which states (at Section 706) that agency actions which are arbitrary, capricious, or involve abuse of discretion will be set aside.

In distinction to Kempinski, the plaintiff Shaller's suggestion was used by the government and he was tendered a $300 award for "intangible" benefits for that use. (The entire controversy of the Shaller case stems from the refusal of the Navy to tender an award for "tangible" benefits for that same use.)

In *Serbin et al. v. United States*, 168 Ct. Cl. 934 (1964), plaintiffs sought recovery of the difference between the maximum $25,000 incentive award and what they were actually given. The court dismissed their petition because it failed to allege abuse of discretion.

In distinction to Serbin et al., the plaintiff Shaller has consistently alleged and demonstrated clear abuse of discretion within the Navy bureaucracy. As noted above, for example, savings of many millions of dollars stemmed from the construction and use of Shaller's non-damage missile catcher known as Skycatch/Fishhook. Yet, the Navy refused to award even a single penny for the "tangible" savings despite the fact that these savings were admitted.

CONCLUSION

For the foregoing reasons, and as noted by this Court in *Data Processing Corporation v. Camp*, 397 U.S. 150 (1970), that

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases"
>
> –397 U.S. 150, 156

this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the United States Court of Claims

No. 292-68

(Decided July 13, 1973)

HERMAN I. SHALLER v. THE UNITED STATES

Thomas J. Greer, Jr., attorney of record, for plaintiff.

Frances L. Nunn, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

OPINION

PER CURIAM: This case comes before the court on plaintiff's exceptions to a recommended decision filed August 11, 1972, by former Trial Commissioner James F. Davis pursuant to Rule 134(h). The court has considered the case on the briefs and oral argument of counsel. Since the court agrees with the decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF COMMISSIONER

DAVIS, *Commissioner:* In 1963, the Navy tendered to plaintiff $300 as an incentive award pursuant to 5 U.S.C. § 2121 *et seq.* (1958) for contributions he made to the Polaris missile program while employed as an engineer at the Naval

Ordnance Experimental Unit (NOEU). Plaintiff refused to accept the award, claiming it was inadequate. Administrative appeal ensued, but his request for a larger award was denied. He now brings suit under 28 U.S.C. § 1491, alleging that the award of $300 (as determined pursuant to administrative procedures under 5 U.S.C. § 2121 *et seq.*) was arbitrary, capricious and not supported by substantial evidence; and that he is entitled to an award of $1,568,000. For reasons noted in ultimate findings 34–38 and the other accompanying findings of fact, I hold that plaintiff has shown no procedural irregularity below; that the $300 award is supported by substantial evidence and was not arbitrary or capricious; that plaintiff's claim for additional compensation is without merit; and that, accordingly, plaintiff's petition must be dismissed.

FINDINGS OF FACT

1. Plaintiff, Herman I. Shaller, brings this suit under the Government Employees Incentive Awards Act, 5 U.S.C. § 4501 *et seq.* (Supp. III, 1965–67). Jurisdiction is based on 28 U.S.C. § 1491 (1958). The petition was filed September 27, 1968.

2. In 1963, the Navy tendered to plaintiff an incentive award of $300 pursuant to 5 U.S.C. § 2121 *et seq.* (1958) (the predecessor statute to 5 U.S.C. § 4501 *et seq.* (Supp. III, 1965–67) and pursuant to Navy Civilian Personnel Instruction 450 (NCPI 450). The tendered award was for "intangible" benefits realized by the Navy as a result of work performed by plaintiff in 1957 while employed by the Naval Ordnance Experimental Unit (NOEU), located in Silver Spring, Maryland. Plaintiff here claims that he is entitled to recover $1,568,000 based on alleged "tangible" benefits to defendant. Accordingly, he seeks to have the $300 incentive award overturned as being arbitrary, capricious and not supported by substantial evidence.

3. The pertinent sections of 5 U.S.C. § 2121 *et seq.* provide as follows:

> **§ 2121. Regulations governing award program; annual report to President.**
>
> The departmental awards program set forth in this chapter shall be carried out under such regulations and

instructions as may be issued by the United States Civil Service Commission which shall annually report the results of the program, with related recommendations, to the President for transmittal to the Congress.

§ 2122. Definitions.

As used in this chapter, the term "department" means an executive department or independent agency in the executive branch of the Government, * * *

§ 2123. Awards.

(a) Departmental.

The head of each department is authorized to pay cash awards to, and to incur necessary expenses for the honorary recognition of, civilian officers and employees of the Government who by their suggestions, inventions, superior accomplishments, or other personal efforts contribute to the efficiency, economy, or other improvement of Government operations or who perform special acts or services in the public interest in connection with or related to their official employment.

* * * * *

(d) Cash awards.

A cash award under this section shall be in addition to the regular compensation of the recipient and the acceptance of such cash award shall constitute an agreement that the use by the Government of the United States or the municipal government of the District of Columbia of any idea, method or device for which the award is made shall not form the basis of a further claim of any nature upon the Government of the United States or the municipal government of the District of Columbia by the employee, his heirs, or assigns.

* * * * *

(g) Maximum monetary award.

A monetary award granted under this chapter shall not exceed $5,000, except that an award in excess of such amount but not in excess of $25,000 may be granted, with the approval of the Commission, in special cases in which the head of a department certifies to the Commission that the suggestion, invention, superior accomplishment, or other meritorious effort for which such award is proposed to be made is highly exceptional and unusually outstanding.

4. The present controversy centers around the development of a system for recovering Polaris test missiles without

damage. The Polaris was the first ballistic missile developed by the United States capable of being launched underwater from a submarine. The missile is launched in two steps. First, the missile is ejected from the submarine by a blast of compressed air acting on the tail of the missile with sufficient force to propel it above the surface of the water. Second, when the missile is out of the water, a rocket motor in the missile's tail ignites to propel the missile to its target.

5. In the early development of Polaris, it was necessary to test the missile's trajectory characteristics and structural properties during underwater launch and prior to rocket-motor ignition. In the summer of 1957, the Navy's Special Projects Office (SPO) informally requested NOEU to study the feasibility of recovering test missiles without damage. Mr. Kupelian, Director of NOEU, assigned the task to N. Rafel, Chief of the Aerodynamics Structures and Mechanical Division. He and his staff, including plaintiff, began a feasibility study of methods of recovering Polaris test missiles. Plaintiff at that time was a mechanical engineer at NOEU.

6. On October 1, 1957, plaintiff submitted a two-page report, No. E4–0019 (hereafter the "019" report), outlining a suggestion for a nondamage recovery system for underwater-launch testing of Polaris missiles. The system consists of a cable attached at one end to the nose of the missile and at the other end to a counterweight suspended above the surface of the water from a tower. The cable is fed through a pulley arrangement at the top of the tower. As the missile exits from the launch tube, the counterweight descends, thereby removing slack from the cable. The counterweight is of sufficient mass to overcome the weight of cable to be reeled-in, plus the friction of the cable-pulley system. When the missile reaches apogee, or maximum height, a braking device restrains backward movement of the cable and holds the missile stationary. The report does not disclose the tower construction, means for supporting the tower in the water, or the type of braking device to be used.

The "019" report discloses curves illustrating the dynamics of missile and cable travel during the launch sequence based on calculations made by plaintiff, which, in turn, are based

on Polaris data available to him at that time. Plaintiff assumed in deriving the curves that the missile would undergo constant acceleration until it exited from the launch tube. Thereafter, it would decelerate until it reached zero velocity a few feet above the surface of the water. Consequently, the dynamic movement of missile and cable, as illustrated by the curves in report "019," can be summarized as follows: The launch tube is located 100 feet below the surface of the water. Prior to launch, there is no cable slack and the counterweight is suspended motionless. The missile is ejected from the launch tube at constant acceleration (linearly increasing velocity). The constant upward acceleration of the missile as it travels through the launch tube is approximately five times greater than the downward acceleration of gravity on the counterweight. Consequently, slack initially develops in the cable. At approximately 0.35 seconds after launch, the slack reaches a maximum of 10 feet and thereafter gradually is taken up. At 0.7 seconds after launch, the missile emerges from the launch tube, and between 0.7 and 0.8 seconds after launch, the slack is completely removed. For the remainder of the flight as the missile decelerates, it acts as a brake on the counterweight and the cable remains taut.

The pulley arrangement in plaintiff's recovery system has a 5:1 reeve ratio. Thus, the counterweight travels only one-fifth the distance traveled by the missile and does not strike the water.

7. Plaintiff's cable recovery system as disclosed in the "019" report, along with several other nondamage recovery systems, were incorporated in NOEU Report No. E4-0020 (hereafter the "020" report), entitled "Feasibility Study of Recovery of Polaris Test Vehicle," dated November 8, 1957. The "020" report was prepared by N. Crone and R. Chaplick, members of the NOEU staff assigned to study the nondamage recovery problem, who had been assigned the specific task of coordinating and writing a report on the results of the feasibility study.

The "020" report describes the cable recovery system in greater detail than the "019" report. For example, it states that for successful operation of the system, it must be assumed that: (1) the forces created by cable slack at the

beginning of the launch are negligible considering the large moment of inertia of the missile; (2) the tension on the cable during the latter part of missile flight (when the cable is taut) has a negligible effect on the tendency of the missile to topple or rotate; and (3) the apex of the trajectory would not exceed 50 feet above the water.

Further, the "020" report suggests as an alternative to plaintiff's falling counterweight for reeling in cable, "a device similar to an aircraft arresting gear except that a pneumatic cylinder is used to expand the loops of cable pulling the end attached to the missile." Apparently, this alternative was suggested during discussions among members of the study group, and plaintiff makes no claim that he suggested this idea. The report concludes by observing that:

> The attached cable recovery system is * * * desirable because of its simplicity and low cost. This is contingent upon obtaining a trajectory apex consistently less than 50 feet above the water.

8. Plaintiff applied for and was granted a United States patent, No. 3,081,626, on his cable recovery system. The patent application, which was assigned to the Navy, was filed September 28, 1960, and the patent issued March 19, 1963. The patent discloses a cable recovery system similar to the system described in reports "019" and "020." However, as described in the patent, the launcher is placed below the surface of the ground, rather than underwater, and the patent specification states that the launcher can be mounted to permit movement simulating actual seagoing ship conditions. Furthermore, the patent does not disclose any numerical data contained in reports "019" and "020."

The patent application was initially classified "Confidential," as were the NOEU reports. On March 6, 1961, the application was declassified pursuant to a letter from the Navy patent counsel stating that the subject matter in the drawings, specification and claims was no longer classified. However, the NOEU reports ("019" and "020") remained classified until shortly before trial in this court.

9. In the latter part of 1957, SPO forwarded the results of the NOEU feasibility study to the Naval Air Engineering Facility (NAEF), located in Philadelphia, and informally

requested NAEF to study the feasibility of a nondamage missile recovery system. The evidence suggests that NAEF was called upon for this task because the NOEU study had concluded that a cable recovery method was desirable; that one such cable recovery method was to use an aircraft arresting gear to reel in the cable; and that NAEF had considerable experience in designing aircraft arresting gear. During the next few months, several meetings were held among NAEF personnel to explore various recovery schemes.

On January 10, 1958, SPO officially assigned NAEF the task of completing the feasibility study and submitting a design proposal for a missile recovery system. The effort was assigned the name "Project Skyhook."

19. The NAEF effort resulted in two reports prepared jointly by J. Heiliczer and M. Siegel, Nos. NAEF–ENG–6353, dated March 25, 1958, and NAEF–ENG–6371, dated August 1, 1958. These reports, which total approximately 200 pages of textual material, tables, graphs, drawings, and mathematical equations, describe and analyze in considerable detail several versions of a cable recovery system. The Skyhook recovery systems were designed to recover a missile launched from a land-based missile launcher, rather than an underwater launcher as used with the operational Polaris missile. Apparently, it was felt that the feasibility of a nondamage cable recovery system could more easily and effectively be determined by first testing a land-based recovery system, and then, after the system had proven feasible, developing a system for recovering underwater-launched missiles.

The systems described in the NAEF reports differ from plaintiff's cable recovery system in the following material ways:

(a) A modified Navy aircraft arresting engine is used to reel in the cable. Basically, an arresting engine is a hydraulically- and pneumatically-operated device capable of reeling in or letting out cable in such a manner that the cable reeled in or let out can be carefully controlled.

(b) The cable is attached to a harness that fits over the nose of the missile and is secured to hoisting lugs mounted at structurally-strong points on the sides of the missile.

(c) The missile is arrested gradually during its downward descent, rather than at apogee, and it comes to rest a few feet above ground.

11. In late summer of 1958, a land-based missile recovery system, designated "Project Skycatch," was constructed at the San Francisco Naval Shipyard, based on the results of the NAEF study. A modified Navy arresting engine was mounted atop a large bridge crane. Cables were reeved from the arresting engine, up two specially constructed towers, and down to the missile harness. The first successful tests were performed October 13, 1958. By March 1, 1963, there had been 125 test missile recoveries at the Skycatch facility.

12. As a followup to the Skyhook study, NAEF conducted a feasibility and design study, designated "Project Fishhook," of a cable recovery system for underwater-launched missiles. This study resulted in a report, No. NAEF-ENG-6464 (the "6464" report), dated February 17, 1959, prepared by J. Heiliczer and M. Siegel, coauthors of the Skyhook report, and W. Goon. The "6464" report, which consists of approximately 175 pages of textual material, tables, graphs, drawings, and mathematical equations, describes and analyzes the system in considerable detail. The recovery system so described differs from plaintiff's counterweight recovery system in the following material respects:

(a) A cable is suspended from a tower mounted on a catamaran barge that floats on the water. In order to prevent the cable from becoming excessively taut or slack prior to launch by movement of the barge, a hydraulically-actuated "slack reducer" automatically maintains the cable tension within specified limits.

(b) A cable is attached to a harness that fits over the nose of the missile and is secured to hoisting lugs mounted at structurally-strong points along the sides of the missile. The portion of the harness that fits over the nose of the missile, called a "beany cap," remains attached to the missile during the launch sequence and is pulled off by cable tension after the missile has broached the water. In this way, the harness lies flat against the sides of the missile during launch and minimally affects missile flight.

(c) As in Project Skycatch, a modified Navy arresting engine reels in the cable and gradually arrests the missile during its downward descent.

In addition to the foregoing major differences between plaintiff's system and the Fishhook system, the "6464" report analyzes several critical factors related to a cable recovery system for underwater launches not considered by plaintiff. Examples include the hydrodynamic effect of the cable system, missile trajectory alteration by the cable, cable-loading history during the launch sequence, barge motion, dynamic and structural effect of cable rotation on the missile, and the effect of tension waves traveling along the cable. Furthermore, the "6464" report considers several limitations placed on the recovery system in order to prevent interference with the flight of the missile. For example, the maximum allowable cable tension is 5,000 pounds prior to launch, 1,500 pounds at launch, and 2,000–2,500 pounds during the flight to apogee; and the maximum allowable cable slack is 3 feet during the entire missile flight.

13. In the first few months of 1959, a Fishhook cable recovery system based on the results of NAEF report "6464" was installed at San Clemente Island, off the coast of California. Cable recovery equipment was mounted on a large catamaran barge equipped with a 200-foot-high gantry tower. The first successful tests with a prototype Polaris missile were run May 1, 1959. By March 1, 1963, there had been 72 test-missile recoveries at the Fishhook facility.

14. The evidence establishes that the Navy's Fishhook and Skycatch facilities are the only installations used by defendant for nondamage recovery of missiles by means of a cable attached to the missile.

15. Credible expert testimony at trial establishes that plaintiff's proposed counterweight cable recovery system, as disclosed in the "019" report and plaintiff's patent, would not satisfactorily recover a Polaris missile for the following reasons:

(a) Attaching the cable to the nose of the missile would produce large bending moments that would alter the trajectory of the missile and produce undesirable structural stress in the missile.

(b) Arresting the missile at apogee would produce excessive tension in the missile, thereby causing structural damage.

(c) Reeling in cable by gravity alone, even with several different counterweights, would not provide sufficient versatility to enable the cable to remain within specified slack and tension limits during the various phases of the launch sequence.

(d) The braking system would not produce sufficient friction between cable and pulleys to arrest the missile.

(e) After the counterweight had taken all slack out of the cable, it would impose excessive loading on the missile.

(f) There is no provision for mounting the tower at a water-based launch site, and no provision for automatically adjusting slack prior to launch as a result of tower movement in the water.

16. Credible testimony at trial establishes that Moses Siegel, the NAEF engineer primarily responsible for the development of the Skycatch and Fishhook recovery systems, had no knowledge of the results of the NOEU feasibility study and independently conceived a cable recovery system using an arresting engine. He and Joseph Auer, Jr., jointly filed a patent application on such a system July 28, 1959, and U.S. Patent 3,053,479 issued September 11, 1962. Neither of these inventors nor anyone else involved in the development of the Skycatch and Fishhook systems, except plaintiff, was considered for an incentive award.

17. Plaintiff's incentive award was determined pursuant to NCPI 450, which was promulgated under 5 U.S.C. § 2121 *et seq.* (1958): Civil Service Regulations for Incentive Awards, ch. I–4 of the Federal Personnel Manual; Department of Defense Directive 5120.15, dated November 24, 1954; and Department of Defense Instruction 5120.16, dated August 22, 1956. NCPI 450 was issued July 1960 and portions were subsequently revised June 20, 1961; August 4, 1961; September 21, 1961; July 20, 1962; and November 19, 1962. The pertinent sections relating to the administration of the Navy incentive awards program provide as follows:

1-3. THE NAVY INCENTIVE AWARDS PROGRAM.

* * * * *

b. Incentive awards.

The program provides incentive awards (cash and/or honorary) which may be granted to an individual employee or to a group of employees for contributions which are either:

(1) Outside job responsibilities, or

(2) Within job responsibilities, provided the contribution is so superior that it warrants special recognition.

* * * * *

1-6. TYPES OF INCENTIVE AWARDS.

An incentive award is a cash and/or an honorary award granted to an employee or group of employees in recognition of an employee contribution which results in benefits to the Navy or to the Government.

a. Cash awards.

Cash awards from $10 through $25,000 may be granted in the Government-wide program under the following conditions:

(1) Cash awards from $10-$5000 may be approved within the Navy.

(2) Cash awards in excess of $5000, but not exceeding $25,000, must be approved by the Department of Defense and the Civil Service Commission.

* * * * *

1-7. DELEGATION OF AUTHORITY TO PAY CASH AWARDS.

The head of each executive department is authorized by Public Law 763, 83d Congress, to pay monetary awards not to exceed $5,000 for an employee contribution which benefits his department. The Secretary of Defense has delegated this authority to the Secretaries of the military departments. The Secretary of the Navy has delegated the authority to approve the payment of cash awards as follows:

* * * * *

b. Departmental approval authority.

Chiefs of bureaus and offices * * * have the authority to approve the payments of awards (initial and additional), based on tangible and/or intangible benefits, that do not exceed $1,000, provided that not more than $500 of the total award for any one contribution is based on intangible benefits. The above named officials may, at

their discretion, redelegate all or any part of their award approval authority to field activities under their management control, subject to the limitation that not more than $300 of the total awards for any one contribution, approved by a field activity, may be based on intangible benefits. * * *

* * * * *

2–3. DEPARTMENT OF THE NAVY.

* * * * *

b. The Secretary of the Navy has assigned to the Chief of Industrial Relations the responsibility for the administration of the Navy Incentive Awards Program.

* * * * *

2–6. NAVY INCENTIVE AWARDS BOARD.

a. The Secretary of the Navy has established the Navy Incentive Awards Board to assist in the attainment of the objectives of the program. This Board is the final board of review on incentive award recommendations for employees of the Navy.

b. The membership of the Board is as follows:

(1) *Chairman—Under Secretary of the Navy.*

(2) Deputy Chairman—Chief of Industrial Relations.

(3) Members—Chief, Navy Management Office, and the Chairmen of Incentive Awards Committees established for the following: Office of the Chief of Naval Operations; Bureau of Medicine and Surgery; Bureau of Naval Personnel; Bureau of Naval Weapons; Bureau of Ships; Bureau of Supplies and Accounts; Bureau of Yards and Docks; Headquarters, U.S. Marine Corps; Commander, Military Sea Transportation Service; Office of Naval Research; and the Executive Office of the Secretary.

c. The Board will perform the following functions:

* * * * *

(5) Exercise final jurisdiction on requests for reconsideration which may arise in connection with the Navy program.

* * * * *

4–12. AWARD ELIGIBILITY.

Awards may be granted to individuals or groups for contributions which are either outside job responsibilities, or within job responsibilities but so superior as to warrant special recognition.

a. Determining the extent of job responsibilities. The local Incentive Awards Committee will determine whether a contribution is outside or within job responsibilities, and, if within, whether or not the contribution is sufficiently superior to warrant an award. To make this determination the Committee should consider performance requirements, position descriptions, supervisor statements, the authority necessary to put an improvement into operation, and other pertinent factors. The Committee will also seek advice from competent authorities when reviewing the contributions of doctors, lawyers, scientists, engineers, and others employed in highly specialized fields. This advice is necessary in order that the relationship between the contribution and the standards for the position may be accurately evaluated. The following questions are offered as a guide in assisting the Committee to make a determination:

(1) Are employees in like positions expected or required to develop similar improvements or to perform in a similar manner?

(2) Does the accomplishment or performance exceed that which is expected to the extent that it warrants award consideration? (In this connection, expected performance should not be confused with acceptable performance. It is not the intent of the program to award performance which merely exceeds the latter.)

* * * * *

b. Eligibility for outside application. If an employee contribution is utilized outside of the originating activity, such use is generally considered outside of the employee's job responsibilities and, therefore, may be used as a basis for award consideration.

c. Originality of employee contributions. Lack of originality in an employee contribution shall not in itself be used as a basis for denying an award. A contribution may be an outgrowth of on-the-job training, private educational endeavor, reading, previous employment experience, outside contracts, or, as is frequently the case, be untraceable as to the origin. The award determination should be based entirely on the usefulness of the contribution to the Government.

18. At the pertinent times in issue, the Bureau of Naval Weapons (BUWEPS) was the parent organization for NOEU. The administrative body that initially determined the $300 award tendered to plaintiff was the BUWEPS In-

centive Awards Committee (IAC). This committee was established pursuant to NCPI 450 § 2–10, which provides in pertinent part as follows:

> 2–10 INCENTIVE AWARDS COMMITTEE.
>
> Heads of activities shall appoint Incentive Awards Committees to serve in an advisory capacity and to assist in the administration of the local incentive awards program. The Committee (or panels thereof) shall be composed of both military and civilian members. The members shall be selected from among the operating staff so that the overall membership of the Committee shall represent adequate technical and administrative ability to evaluate all types of employee contributions. * * *
>
> **a. Committee responsibilities.**
>
> * * * The responsibilities of the Committee include the following:
>
> * * * * *
>
> (2) Determining the value of the contribution in terms of tangible and intangible benefits.
>
> * * * * *
>
> (4) Computing and recommending the amount of award, if any, to be granted.
>
> * * * * *

19. By letter dated April 19, 1963, BUWEPS Patent Counsel recommended to BUWEPS IAC that plaintiff be considered for an incentive award for his contributions to the Skycatch and Fishhook programs. Prior to acting on this recommendation, IAC sought and received information upon which to make a determination. Mr. S. Cooper of SPO recommended by letter dated May 5, 1963, that no award be made because (a) plaintiff was only one member of the NOEU team that investigated several different nondamage recovery systems for missiles, (b) plaintiff's proposed system only "approximated very generally" the Skycatch system, and (c) a NAEF team, headed by C. Mester and M. Siegel, was responsible for developing the operational Skycatch system which used an aircraft arresting engine rather than a counterweight. On the other hand, R. Sciascia of the BUWEPS Patent Division replied by letter dated August 8, 1963, that plaintiff provided the "basic inventive concept and broad general arrangement" for the Skycatch and Fishhook systems, whereas M. Siegel of NAEF developed a "refined and

operationally desirable arrangement which embraces the basic concept proposed by Mr. Shaller."

20. By letter dated August 30, 1963, IAC recommended that plaintiff be awarded $300 for "intangible local-exceptional" benefits realized by BUWEPS from plaintiff's contribution to the Skycatch program. The committee enumerated facts on which its recommendation was based, such as the similarities between plaintiff's idea and the recovery method used in the Skycatch system.

The amount of award was made pursuant to NCPI 450 § 5-6, which provides in pertinent part as follows:

> 5-6. AWARD SCALES FOR INTANGIBLE BENEFITS.
>
> Cash awards based primarily upon intangible benefits will be determined in terms of the extent of application of the contribution, the significance of the contribution, and the importance of the programs affected. * * *
>
> * * * * *
>
> **b. Award scale for other intangible benefits (including bureau-wide and Navy-wide application of safety improvements).**
>
> The guide given here is designed to give effect to the principle that the amount of cash award for each employee contribution should be determined on the basis of its particular benefit to the Government and the people. It is apparent that, because of the nature of intangible benefits, no guide can be so conclusive as to make the determination of appropriate awards an automatic and simple process. The final determination must still be arrived at by the application of informed judgment, which considers all influencing factors, such as the relative importance of programs affected, seriousness of problems solved, duration of benefits, and the degree to which the employee contribution exceeds normal job expectancy.

Section 5-6 contains an award table based on the degree of benefit and extent of application of the contribution. An "exceptional" degree of benefit is the highest possible benefit and is defined as "an initiation of a new principle or major procedure; or superior performance of tasks, or other acts or services, which materially affect major programs such as a contribution which substantially advances an important activity of the Department or makes a significant contribution to scientific knowledge." A "local" extent of application "affects ac-

tivity-wide operations and/or a substantial number of people or their work, within the activity; or is in the public interest only in the locality." More extensive applications providing for higher awards are "extended," "broad" and "general," defined as follows:

> Extended—Applicable to several major activities or a large number of small activities and affects a substantial number of people in its application; has extremely wide application covering an entire Department or number of Departments or Agencies but has only very limited use or affects only a very small number of people in each instance of application; or is in the public interest in several localities or in a region.
>
> Broad—Applicable to many activities, installations, or facilities and affects a large number of people in its application; has extremely wide application covering an entire Department or a number of Departments and Agencies but has only moderate use or affects only a moderate number of people in each instance of application; or is in the public interest in several regions.
>
> General—Applicable and extensively used throughout a large Department or a number of Departments and Agencies and affects a large number of employees in each instance of application; or is in the public interest throughout the Nation or beyond.

The range of award for a "local-exceptional" intangible benefit is $100–300; for "extended-exceptional" is $200–450; for "broad-exceptional" is $400–750; and for "general-exceptional" is $750-up.

21. On November 29, 1963, plaintiff wrote the Navy Chief of Industrial Relations (CIR) expressing his disagreement with the award recommended by IAC and requesting a hearing and reconsideration by the Navy Incentive Awards Board NIAB). The CIR construed plaintiff's letter as a request for reconsideration of the incentive award and referred plaintiff's claim to BUWEPS pursuant to NCPI 450 § 4–13, which provides in pertinent part as follows:

> 4–13. REQUESTS FOR RECONSIDERATION AND EXCEPTIONS.
>
> * * * * *
>
> **a. Requests for reconsideration.**
>
> A suggester, or a person initiating a superior accomplish-

ment award recommendation may request a reconsideration of a decision involving an interpretation or application of this Instruction, the merits and values of an employee contribution, or the eligibility of an employee to receive an award. Such a request must be in writing, must contain the justification or basis for the request, and must be submitted to the local incentive awards office within 30 days after the receipt of the decision which prompted the request. Upon receipt of the request, it shall be reviewed to determine whether a discussion with the employee would be of any value in resolving the request. Frequently, such a discussion, explaining or clarifying the decision, will resolve the request without further action. However, if a discussion would serve no useful purpose or if the discussion does not resolve the issue to the satisfaction of the employee, the action necessary to resolve the request will be taken. This action may require a further review by local management or it may require a review and decision by a higher authority. In any event, the request should be acted upon at the lowest level of management which will ensure an authoritative, complete, and impartial consideration of the case. Requests for reconsideration will be processed as follows:

* * * * *

(2) Requests for reconsideration involving the merits and values of an employee contribution, or the eligibility of an employee to receive an award will be reviewed and resolved at the management level vested with the authority to decide the points at issue in the request. The majority of these requests involve matters under the control of the local command; therefore, the final decision on such requests can be rendered by the head of the activity. In a small percentage of the cases it may be necessary to refer the requests elsewhere for review.

* * * * *

22. (a) On December 18, 1963, the Chief of BUWEPS wrote plaintiff requesting him to specify any errors, omissions, misunderstandings, or inconsistencies plaintiff thought were contained in the IAC award recommendation. Plaintiff replied the same day, alleging that the award determination (1) did not consider benefits resulting from the Fishhook program, (2) did not consider tangible monetary savings to defendant from the Skycatch and Fishhook programs, (3) did not take cognizance of the fact that the Skycatch and Fishhook systems were the first systems for recovery of a

launched missile without damage, and (4) obscured the fact that plaintiff provided the basic inventive concept and broad general arrangement of Skycatch and Fishhook. Furthermore, plaintiff claimed that his contribution resulted in a savings of $300,000,000 to defendant based on the first 4 years of operation of Skycatch and Fishhook, and that he was entitled to separate $25,000 awards for 1 year of operation of Skycatch and Fishhook.

(b) By letter dated December 4, 1963, plaintiff advised the Chief, BUWEPS, that he would return the $300 incentive award check. On March 1, 1964, plaintiff returned the check to the Naval Research Laboratory, his employer organization which had issued the check at the direction of BUWEPS.

23. On February 6, 1964, BUWEPS advised plaintiff that his award determination had been reconsidered in light of additional information obtained from technical personnel of SPO, BUWEPS and NOEU. It was concluded that the inventive concepts and broad general arrangement of the Skycatch and Fishhook systems resulted from the efforts of many persons, and that an award of $300 to plaintiff was appropriate in recognition of his participation in the original NOEU feasibility study.

The additional information obtained by BUWEPS included a letter from N. Crone and N. Rafel of NOEU outlining the history of the NOEU recovery system feasibility study. They stated that plaintiff was one of several people at NOEU who disclosed various possible recovery systems, and that plaintiff's contribution was a "mathematical analysis" of a counterweight, cable recovery system. They further stated that although this analysis was probably not specifically requested of plaintiff, he was a member of the staff assigned to investigate missile recovery systems.

The director of SPO also furnished information and comments to BUWEPS regarding the background of the Polaris recovery program. He recommended that plaintiff not be given an additional award because there was never any intention to expend the money plaintiff claimed to have saved defendant, and the broad general arrangement of the Polaris recovery system was probably not attributable to any single person.

24. On February 14, 1964, plaintiff wrote the CIR requesting reconsideration of his case and a hearing by the NIAB. On April 2, 1964, CIR replied that plaintiff's case had been fully considered and reconsidered by BUWEPS; that such action fully complied with the requirements of NCPI 450 § 4-13a(2); and that such section did not provide for a hearing. (Finding 23.)

25. On April 18, 1964, plaintiff wrote to the Secretary of the Navy requesting his assistance in resolving plaintiff's case. In response, the Assistant Secretary of the Navy for Research and Development wrote the Chief of Naval Material on April 22, 1964, requesting an investigation and hearing for plaintiff. On June 12, 1964, the Deputy Chief of Naval Material (Management and Organization) replied that plaintiff had exhausted the Navy procedures for adjudicating incentive award claims. He stated that NCPI 450 provided that award eligibility be reviewed only at the management level vested with authority to decided the issues, apparently referring to § 4-13a(2). (Finding 23.) Therefore, he construed plaintiff's letter to the Secretary of the Navy as a "personal request for reconsideration at a level above that provided under current regulations." He then recommended that plaintiff's case be referred to NIAB for further consideration.

26. NIAB then referred plaintiff's case to the Navy Distinguished Civilian Service Awards Panel (DCSAP) pursuant to the following pertinent provisions from the guidelines regulating the operation of NIAB:

> 8. *NIAB Panels*
>
> The NIAB may establish special panels to assist in performing the work of the Board.
>
> a. *DCSA Panel*
>
> The DCSA Panel, as a special panel of NIAB, shall have complete authority to act for the Board on all cases referred to it for consideration. The Panel shall report to NIAB on all actions taken by the Panel. The membership, quorum, voting, and duties of the Panel are defined as follows:
>
> (1) *Membership*
>
> (a) Chairman
>
> The Deputy Chairman of the NIAB

(b) Two members designated by the Chairman or Deputy Chairman of the NIAB

(c) Executive Secretary
Executive Secretary of the NIAB (Non-voting member)

(2) *Quorum*
Full membership shall be necessary to constitute a quorum.

(3) *Voting*
A unanimous vote of the Panel membership shall be required to approve an award recommendation presented to the Panel for consideration.

(4) *Duties*
The Panel shall meet upon the call of the Chairman to consider and act upon the following types of award recommendations:

(a) Recommendations for the Distinguished Civilian Service Award.

(b) Recommendations which involve cash awards coupled with the DCSA.

(c) All award recommendations involving employee contributions which contain classified material.

(d) Recommendations for non-Navy awards.

The evidence establishes that DCSAP was assigned plaintiff's case because, under § 8a(4)(c) of the NIAB guidelines (above-recited), one of the duties of DCSAP was to act upon "award recommendations involving employee contributions which contain classified material." NOEU reports "019" and "020" were classified at that time.

27. On November 9, 1964, DCSAP heard plaintiff's case. The evidence establishes that plaintiff made a comprehensive presentation of his views and that there was a full and free exchange of questions and answers between plaintiff and the Panel. On November 20, 1964, DCSAP notified the Under Secretary of the Navy as follows:

> After consideration of all the factors involved, the Panel finds that the award of $300 already approved by the Bureau of Naval Weapons is ample recognition for Mr. Shaller's contribution in this instance.

An internal Panel memorandum states that the Panel's decision was unanimous and was arrived at by placing heavy emphasis on the following points:

> (a) SPO used a number of sources for obtaining solutions to the recovery problem.
>
> (b) SPO assigned the project of studying nondamage missile recovery systems to NOEU and it was reasonable to expect that NOEU would provide solutions to the recovery problem.
>
> (c) Plaintiff, as a member of the NOEU study group, did make a contribution to the recovery proposals submitted to SPO and was entitled to an award. However, the cable recovery system he suggested was an application of well-known principles to this type of problem and his performance was expected from employees in the field.

On November 25, 1964, the Under Secretary of the Navy notified plaintiff of the DCSAP determination.

28. On February 5, 1965, plaintiff wrote Admiral R. Moore, the CIR and also chairman of DCSAP, requesting an explanation of the basis of the Panel's decision, and specifically, an explanation of the Panel's determination that there were no tangible benefits resulting from the plaintiff's contribution. On February 19, 1965, Admiral Moore replied in part as follows:

> 2. The Navy Incentive Awards Board was well aware that tangible benefits did result from the use of the nondamage missile recovery system when compared to other methods used in the past. This was inherent in the plans of the Special Projects Office to pursue a program of launching and recovering test missiles without damage. However, the Board determined that these benefits should not be used as a basis for determining an award for your contribution to the development of the system. This determination was based in part on the fact that the Special Projects Office concluded that the required engineering talent to develop a nondamage missile recovery system was available and the test program was planned accordingly. It was also evident from the information contained in the case file and from your presentation at the Board meeting that no single individual was totally and exclusively responsible for the benefits derived from the recovery system which was finally devel-

oped and used but rather that this system represented ideas contributed by a number of persons at the departmental level and in the field. The Board determined further that the personnel assigned to this task were expected to develop solutions to the problems concerning nondamage recovery of missiles and that your contribution, one of several embodied in the system, was in that category. In this connection, the Board noted that except for the award granted you, no other employee received an award for his contributions to the development of the system.

29. On March 13, 1965, plaintiff wrote Admiral Moore requesting that the amount of award be increased in view of the tangible benefits that resulted from the Skycatch and Fishhook programs. Plaintiff alleged that these tangible benefits, in turn, resulted from his contributions. Admiral Moore replied on March 19, 1965, that plaintiff's request for additional award was given full and fair consideration by NIAB and that its determination was final.

30. Plaintiff alleges that he was considered for a "Presidential" award according to a letter dated February 18, 1966, from the Assistant Secretary of the Navy to Paul H. Robbins of the National Society of Professional Engineers. However, this letter clearly indicates that plaintiff was considered only for an "Agency" award. The letter states in pertinent part as follows:

> The President has asked me to reply to your letter of January 31, 1966.
>
> Your comments and views concerning the Navy's general participation in the Incentive Awards Program and Mr. Herman I. Shaller's case in particular are appreciated. As you have pointed out in your letter, Mr. Shaller's case has received a thorough and exhaustive review within the Department of the Navy. Accordingly, it is not felt that further consideration of the appropriateness of Mr. Shaller's award is warranted.
>
> I cannot agree that there is a lack of uniformity in the Navy's participation in the Incentive Awards Program. The amount of savings realized by the Government is only one of the many applicable criteria which are involved in determining incentive awards. Eligibility and job expectancy are other important standards which are considered. It is, therefore, the application of all of these criteria, which must be exercised with uniformity, and you may be assured that the Department of the Navy

> will continue to make every effort to see to it that such a standard prevails.

Furthermore, all other evidence introduced at trial establishes that plaintiff was considered only for an "Agency" award.

31. Plaintiff alleges that his contribution resulted in savings to defendant of $1,566,950,000, computed as follows:

(a) Defendant admits that between January 1958 and August 1968, it used the Skycatch system 263 times and the Fishhook system 144 times, for a total of 407 missile recoveries. This figure includes 197 recoveries of Polaris missiles, using both systems, between October 1958 (when the first successful tests of the Skycatch system were conducted) and March 1963 (when plaintiff first requested an incentive award); and recoveries of the Poseidon and Sprint missiles.

(b) Defendant admits that the cost of a fully instrumented Polaris or Poseidon test missile is $1,100,000.

(c) Plaintiff alleges that a nondamage recovery of a test missile produces savings greater than the cost of the missile, and estimates this saving to be 3.5 times the cost of the missile. This estimate is based on plaintiff's assumption (unsupported by the record) that the total loss resulting from a nonrecoverable test-firing of a missile includes not only the cost of the missile itself but also the cost of nonrecoverable instrumentation associated with the missile, including the cost of developing such instrumentation.

(d) Therefore, the total savings, as alleged by plaintiff, would be computed as:

$$3.5 \times 407 \times \$1,100,000 = \$1,566,950,000.$$

32. Plaintiff alleges that the savings described in finding 31 are tangible benefits to defendant and that, therefore, his incentive award should be determined under NCPI 450 § 5–5, "Award Scale for Tangible Benefits." Section 5–5 provides that if the savings are more than $1,000,001, the amount of award is $1,150 for the first $100,000 savings, plus $5 for each additional $5,000 savings or fraction thereof. Thus, the amount of award computed by plaintiff is:

(1)	$1,566,950,000
	− 100,000
	$1,566,850,000

(2) $\$1{,}566{,}850{,}000 \times \frac{5}{5{,}000} + \$1{,}150 = \$1{,}568{,}000$

33. (a) Plaintiff's claim for award is based on use of the Skycatch and Fishhook systems by defendant for more than 10 years, despite NCPI 450 § 5–4, which provides in pertinent part as follows:

> 5–4. DETERMINING THE AMOUNT OF A CASH AWARD.
>
> The amount of a cash award to be granted for an employee contribution is determined by applying the award scales in this section to the dollar benefits and/or intangible benefits *which will accrue during the first full year that a suggestion is in operation* * * * [emphasis added].
>
> * * * * *
>
> **b. Computation of dollar benefits.**
>
> Dollar benefits resulting from employee contributions are computed on the basis of the estimated net savings for the first full year that the contribution is in actual operation. In determining net savings, however, care should be exercised so that only savings involving labor, materials, and/or the cost of services are included. Predetermined or prorated overhead or burden costs should not be included in the computation of savings. * * *

Furthermore, the evidence establishes that although it was recognized at the inception of the Polaris program that many test firings would be necessary to adequately test the missile, the program was funded for only four Polaris structural test vehicles.

(b) Plaintiff's allegations and computations set out in findings 31–33(a) are irrelevant, insofar as they seek an award greater than $25,000, since 5 U.S.C. § 2123(g) and 5 U.S.C. § 4502(a) and (b) expressly limit incentive awards to a maximum of $25,000 for either "Agency" or "Presidential" awards. Accordingly, the maximum incentive award which may be granted under the statutes is $50,000 (a $25,000 "Agency" award and a $25,000 "Presidential" award); and since plaintiff was never considered for a "Presidential" award, the maximum award under the statute to which he could be entitled is $25,000.

Ultimate Findings and Conclusions

34. Under incentive awards legislation (particularly 5 U.S.C. § 4501 *et seq.* and its predecessor statute, 5 U.S.C. § 2121 *et seq.*), heads of Government agencies have discretion to make or not make awards, and to tailor the awards as they see fit in accordance with administrative regulations. The courts will not upset agency determinations except for a clear showing of abuse of discretion. *Martilla* v. *United States*, 118 Ct. Cl. 177 (1950); *Kempinski* v. *United States*, 164 Ct. Cl. 451 (1964), *cert. denied*, 377 U.S. 981; *Serbin* v. *United States*, 168 Ct. Cl. 934 (1964).

35. Plaintiff has not shown that he was denied any procedural rights under the Navy's regulations implementing 5 U.S.C. § 2121 *et seq.* or 5 U.S.C. § 4501 *et seq.* Plaintiff was accorded full consideration in the first instance by the BUWEPS Incentive Awards Committee (findings 17–20) and, upon request, was granted reconsideration by such committee. (Findings 21–23.) Thereafter, upon further request by plaintiff, he received additional consideration (including a hearing) from the Distinguished Civilian Service Awards Panel (DCSAP), a panel of the Navy Incentive Awards Board (NIAB), duly constituted under the Navy incentive awards regulations. (Findings 25–29.) Consideration by DCSAP, though afforded plaintiff, was not required by the Navy's regulations. (Finding 25.) Plaintiff was never considered for a "Presidential" award pursuant to 5 U.S.C. § 4504. (Finding 30.)

36. Plaintiff has not shown that the Navy abused its discretion in tendering to him an award of $300 for "intangible" benefits based on his contribution to the Skycatch and Fishhook systems. The Navy's decision to award plaintiff for "intangible" benefits and not for "tangible" benefits was not arbitrary, capricious or unsupported by substantial evidence because (a) plaintiff's contribution was but part of a large number of contributions going to make up a complex and detailed system, (b) plaintiff's contribution and ideas were substantially modified by others in arriving at a practical and workable system, and (c) plaintiff's proposed system, using a

counterweight, was not feasible, was never used, and contributed only in a general way to the ultimate development of the cable recovery systems. (Findings 6, 7, 9–13, 15, 16.) While the Skycatch and Fishhook systems, as finally designed, built and used, no doubt resulted in tangible savings to the Government, plaintiff's contribution to such systems provided a basis only for an award of "intangible" benefits, and it was within the Navy's sound discretion to so determine. The Navy made no incentive awards to anyone for "tangible" benefits derived from the Skycatch and Fishhook programs, a decision which was fully within the Navy's discretion in view of the number of persons and naval activities participating in the ultimate design, construction and use of Skycatch and Fishhook facilities. (Finding 16.)

37. Plaintiff has not shown that the award of "intangible" benefits based on the criteria of "local" was arbitrary, capricious or not supported by substantial evidence. The administrative record, as well as evidence at trial, shows that the Skycatch and Fishhook systems were used at only two Navy installations (finding 14), and it was reasonable and not an abuse of discretion to conclude, pursuant to the regulations defining "intangible" benefits, that such use was "local." (Finding 20.)

38. Plaintiff was never considered for a "Presidential" award (finding 30), and the maximum "Agency" award under the statute authorizing incentive awards is $25,000. (Finding 33(b).) Therefore, plaintiff in no event would be entitled to an award of $1,568,000, as alleged. (Findings 31–33(a).)

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

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No. 73-564

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HERMAN I. SHALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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HERMAN I. SHALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit in the Court of Claims challenging as inadequate a $300 incentive award granted him by the Navy. The incentive award was made in recognition of petitioner's work on a test missile recovery system, and petitioner claims he is entitled to an award of $1,568,000.[1] The Trial Commissioner, after reviewing the evidence (Pet. App. 1a-24a), determined that the Navy had not abused its discretion in making the award (Pet. App. 25a-26a):

> (a) plaintiff's contribution was but part of a large number of contributions going to make up a complex and detailed system, (b) plaintiff's contribution and ideas were substantially modified by others in arriv-

[1] The maximum monetary award payable by law is $25,000. 5 U.S.C. 4502.

> ing at a practical and workable system, and (c) plaintiff's proposed system * * * was not feasible, was never used, and contributed only in a general way to the ultimate development of the [missile] recovery systems.

The Court of Claims dismissed petitioner's claim on the basis of the Trial Commissioner's opinion (Pet. App. 1a).

Agencies have broad discretion to make incentive awards, and such awards must be sustained in the absence of a showing of abuse of discretion. *Kempinski* v. *United States,* 164 Ct. Cl. 451, certiorari denied, 377 U.S. 981; *Serbin* v. *United States,* 168 Ct. Cl. 934.[2] The court below determined that there had been no abuse of discretion in the making of petitioner's award, in an opinion (of the Trial Commissioner) on which we rely. Further review of this factual issue is unwarranted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[2] Indeed, it seems reasonably clear that Congress intended to leave the determination of the proper amount of an award—and of whether an award should be granted at all—to the complete discretion of the agency head, except that where he determines to grant an award in excess of $5,000 the propriety of the award is subject to review by the Civil Service Commission. See 5 U.S.C. 4503 and 4502(b) and (d).

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IN THE
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OCTOBER TERM, 1973

No. 73-564

HERMAN I. SHALLER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Government's contention that petitioner's system "was not feasible" is contrary to well known laws of classical (Newtonian) mechanics and sound engineering principles. Petitioner was granted United States Letters Patent 3,081,626 for his test missile recovery system. Patents are issued by the U.S. Patent Office only when a device or system convincingly demonstrates the combination of attributes of novelty, utility, and unobviousness. The Government's contention in this instance is

therefore in direct conflict with and contrary to a determination by the U.S. Patent Office.

The Government's contention that petitioner's system was never used is a factual misrepresentation. An award for 300 dollars for "intangible" benefits was tendered to petitioner in view of that use. This controversy arose because of the Government's refusal to tender a proper award for admitted "tangible" benefits, as required under the law.

The Government's contention that the granting of an award and determination of the proper amount of an award was intended to be left to the "complete discretion of the agency head" is in conflict with the specification of proper amounts of dollars to be awarded for specified dollar savings issued by the U.S. Civil Service Commission under the incentive awards law. That table of specified awards and savings is an integral part of the Navy's Civilian Personnel Instructions. The issue is whether the head of an agency is required to comply with the law and his own agency's regulations, or whether he is above the law in this connection.

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